SURFRIDER FOUNDATION

February 14, 2014

California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94150
Submitted via email at SLRGuidanceDocument@coastal.ca.gov

Re: Surfrider Foundation Draft Sea-Level Rise Policy Guidance Comments

Dear California Coastal Commission Staff and Commissioners:

Please accept these comments from Surfrider Foundation's Legal Department on behalf of Surfrider Foundation ("Surfrider"), our 22 California grassroots Chapters and our over 250,000 supporters, activists and members worldwide. Surfrider Foundation is a 501(c)(3) non-profit organization that is dedicated to the protection and enjoyment of oceans, waves and beaches through a powerful activists network. The following is a series of recommendations designed to highlight specific legal issues related to the Draft Sea Level Rise Policy Guidance. Through Surfrider's extensive work on coastal preservation issues, we are keenly aware of the climate adaptation challenges faced by our coastal decision-makers. Surfrider is concerned that California is moving toward a de facto policy of encouraging permanent coastal development and fortification. This dangerous de facto policy not only jeopardizes the near shore ecosystem, beach access and coastal infrastructure, but also puts more private property at risk from sea-level rise and climate change. This trend is not consistent with the purposes and policies of the Coastal Act. These legal comments are submitted in addition to our overall comment letter on the Draft Sea Level Rise Policy Guidance ("Draft Guidance"). While Surfrider applauds the Coastal Commission for taking steps to proactively address sea level rise, this letter addresses several ongoing challenges with the Coastal Commission's approach to sea level rise and presents legal alternatives to address them.

Experience Demonstrates that Once Development is Permitted Along the Coast, it can be Essentially Permanent.

The Draft Guidance correctly notes the need to evaluate erosion impacts over the lifetime of a structure and ensure that environmentally sensitive areas and public access will be protected in the face of rising seas. While Surfrider applauds the Commission's focus on providing continued protection of sensitive habitats and public access under changed circumstances in the future, the current Draft Guidance does not go far enough to ensure lasting protection of coastal habitats and public access. The Draft Guidance indicates that

measures to protect existing structures should limit the use of coastal protection structures, such as seawalls, and that the use of such protection structures should be time-limited "for example to the lifetime of the structure."[1] In the current Draft Guidance, the Commission provides no guidelines on the lifetime of existing structures and states that if a Local Coastal Plan does not specify a shorter timeframe for new projects, "a minimum of 75 to 100 years should be considered as the design life for primary residential and commercial structures."[2]

If a 75 to 100 year timeline is used for new structures, any new planning and permitting activity should account for the amount of sea level rise that will take place over this time frame. According to the National Climate Assessment, by 2100 California is projected to experience between 31-50 inches of sea level rise (low range of models) and 43-69 inches of sea level rise in the high range of models.[3] This amount of sea level rise will have significant impacts on the California coast, including increasing rates of erosion. As such, a 75 to 100 year time frame for new structures is likely too long to allow for a meaningful response to the dynamic changes California's coastline will experience as a result of sea level rise. Furthermore, the Coastal Commission's failure to provide guidance on the lifetime of existing structures exacerbates the risk that these structures will be permitted to persist at the expense of environmentally sensitive habitat areas and public access.

The Draft Guidance does not go far enough to require reevaluation of coastal protection structures on a timeframe that is meaningful with respect to the projected impacts of sea level rise. Because of the dynamic nature of the changes that are expected, more frequent reevaluation of coastal protection structures and shorter development lifetimes for new construction are necessary if meaningful retreat that protects coastal habitats and public access is to be pursued. In the absence of such measures for frequent reevaluation, as well as robust enforcement to ensure removal of structures that do not conform with the Coastal Act, California will adopt a de facto policy of permanent coastal development and fortification —a policy that would be in inconsistent with Chapter 3 of the Coastal Act due to its failure to balance environmental and public access concerns against private development.

---

[1] Draft Gudiance at 24.

[2] Draft Guidance at 67.

[3] Caldwell, M. R., Hartge, E. H., Ewing, L. C., Griggs, G., Kelly, R. P., Moser, S. C., Newkirk, S. G., Smyth, R. A., & Woodson, C. B. (2013). Chapter 9: Coastal Issues. In: Garfin, G., Jardine, A., Merideth, R., Black, M., & LeRoy, S. (Eds.), *Assessment of Climate Change in the Southwest United States: a Report Prepared for the National Climate Assessment*, A report by the Southwest Climate Alliance. Washington, DC: Island Press at p. 176 (hereinafter "National Climate Assessment"); *See also* Naional Research Council, *Sea Level Rise for the Coasts of California, Oregon, and Washington: Past, Present, and Future,* Washington, DC: The National Academies Press, 2012 *available at* http://www.nap.edu/catalog.php?record_id=13389 (stating that sea level along the California coast south of Cape Mendocino is projected to rise 4-30 cm [2-12 in] by 2030, relative to 2000 levels, 12-61 cm [5-24 in] by 2050, and 42-167 cm [17-66 in] by 2100. These projections are close to global sea-level rise projections).

These issues are likely to become particularly significant as the Coastal Commission confronts areas where property owners with existing sea walls permitted under section 30235 begin to experience end-effect erosion. These existing seawalls cause conflicts with neighboring properties, which cannot build seawalls due to permit conditions and section 30233's prohibition on new coastal armoring. The Coastal Commission has already confronted this issue in the Swan/Green Valley matter in 2009. Here, the Commission addressed an emergency erosion issue where a sea cave had formed behind a seawall permitted under section 30235 in Capitola. The solution allowed temporary fill of the cave (tantamount to a seawall) on to a property that had covenanted not to build one.[4] A permanent solution for this coastal erosion problem has yet to be implemented. This illustrates how as sea level rise advances and end-effect erosion becomes more pronounced, the Commission could adopt a de facto policy of limitless coastal fortification, and, in turn, render structures along the coastline essentially permanent.

While Surfrider applauds the Coastal Commission's efforts to obtain covenants that new development will not require seawalls, these covenants alone will not be sufficient. As the Capitola example demonstrates, the Coastal Commission is likely to be faced with increasing conflicts between section 30235 and section 30233's broad prohibition on armoring. The only way to address these conflicts and remain true to the Coastal Act's policies safeguarding environmentally sensitive habitat areas and public access is to recognize that existing structures have limited lifetimes and, where feasible, use forward planning mechanisms (such as Transfer of Development Rights systems, rolling easements, and moveable structure design approaches) to avoid de facto armoring of the coast by protecting structures in perpetuity and allowing existing and future development to become essentially permanent. Once the limited lifetime of these structures is both recognized and built into the forward planning process, meaningful sea level rise adaptation policies that protect public access and coastal habitats will be achievable if the Coastal Commission engages in a program of robust enforcement.

An important cautionary tale regarding the need for robust enforcement can be drawn from important public access litigation in Texas. (See Box 1.) While recognizing that the coastal issues in Texas are distinct from those in California, Surfrider brings the Texas example to the Coastal Commission's attention because Texas was widely thought to have the strongest provisions protecting public access and promoting adaptive retreat, but these policies have been rendered ineffective due to a lack of political will to vigorously enforce and inadequacy of enforcement resources, even when the desire to enforce existed. Texas illustrates that while covenants promoting retreat in response to erosion are important, they will not be sufficient on their own. Covenants not to armor need to be coupled with policies to promote public access through forward planning that facilitate retreat from eroding shorelines along with robust enforcement.

Under the Texas Open Beaches Act the "public beach" is defined to be the beach seaward of the first line of vegetation to which the public has acquired a right of access by

[4] *Permit Amendment Permit No. A-3-CAP-99-023-A1* hearing before California Coastal Commission (Oct. 7, 2009).

dedication, prescription, or custom.[5] The Open Beaches Act requires that each person purchasing real estate that may come to lie on the public beach expressly acknowledge that under Texas law, if erosion or a storm event causes the purchasers home to encroach upon the public beach, the property owner can be subject to an enforcement action by the state General Lands Office that requires removal of the home.[6] The theory behind this acknowledgment is that it should make it easier for the General Land Office to initiate enforcement actions against property owners and ensure that the public beach remains unobstructed for safe public access. However, recent experience has called into serious doubt the enforceability of this limitation and Texas' ability to preserve an open beach for the public's use.

[5] Tex. Nat. Res. Code § 61.001(8).

[6] *Id.*; *see also* TEX. NAT RES. CODE § 61.0185 (authorizing enforcement action by the General Land Office).

Texas: A Cautionary Tale

Three recent events are particularly important in understanding the difficulties faced by Texas in enforcing its policies to protect the public beach: (1) the modification of the Beach and Dune Rules following Hurricanes Rita and Ike; (2) the *Severance* litigation; and (3) the State's ongoing enforcement efforts in the *Brannan* matter. As described in more detail below, each of these events clearly demonstrates the political and practical constraints that can imperil public beach access in the absence of a robust enforcement regime.

As of 2005, Texas' Beach and Dune rules barred beachfront owners from reconnecting utility service to their homes after a storm event if the storm moved the line of vegetation landward and the subject home came to lie on the public beach. In theory, each home that came to lie on the public beach after a storm event should have been subject to an enforcement action requiring removal of the home, consistent with the language in Texas' required real estate acknowledgement. However, in the aftermath of a particularly severe storm season in 2004, the Texas Land Commissioner decided that the number of homes that had come to lie on the public beach was too many to enforce against at one time, and exercised his authority under the Open Beaches Act to issue a two-year moratorium on enforcement against these homes. When the moratorium ended, GLO still lacked a comprehensive strategy to determine which homes to enforce against, and therefore adopted a de facto policy of non-enforcement. Recognizing that there were still numerous homes on the public beach (many directly impeding public access and presenting public safety hazards) and that many of these homes were in need of repairs, in 2009 the General Land Office modified the Beach and Dune Rules to permit repairs that would otherwise be forbidden to homes that are seaward of the vegetation line upon the issuance of a disaster recovery order finding that the property is seaward of the vegetation line solely as the result of a storm event.[1]

The second major development was the litigation in *Severance v. Patterson*, a constitutional challenge to Texas' enforcement of the Open Beaches Act. Setting aside the long and complicated procedural history, *Severance* is significant because the Supreme Court of Texas upset long-settled understandings of the legal definition of the public beach in Texas. Traditionally, Texas law was interpreted to establish public access to the dry sand beach wherever it came to lie by operation of the forces of nature. Under pre-*Severance* cases, courts concluded that a long tradition of customary access had established the public right to access along the entire Texas coastline and that that right of access existed wherever the public beach happened to lie. In *Severance*, the Supreme Court of Texas dramatically limited the scope of the public beach in West Galveston, finding that public access existed only until such time as the oceanfront parcel over which it was established became submerged. At that time, the Court concluded a new right to public access would have to be established over the new first-line property. In addition, the court held that contrary to traditional interpretations of the Texas common law, the public's right of access did not move with storm-driven shifts in the location of the dry sand beach. In essence, this litigation over Open Beaches Act enforcement has eliminated public beach access over major stretches of the Texas coast and established the homes there as permanent installations until they fall into the sea.

The *Brannan v. State of Texas* case involves an ongoing battle between beachfront homeowners against the State, General Land Commissioner, Attorney General and Defendants Surfrider Foundation and Environmental Defense who intervened in the case. The beachfront homeowners challenged public beach access easements (or right to make beneficial use of the land) in Surfside Beach, where the plaintiffs' houses ended up on the sandy beach after Tropical Storm Frances in 1998. At issue are the rolling easement doctrine and the strength of the Texas Open Beaches Act. Surfrider activists testified to the public's use over decades of beachgoing through engaging in usual beach related activities, such as swimming, boating, surfing, fishing, picnicking, sunbathing, beach combing and relaxing. In August 2009, the Court of Appeals for the First District of Texas issued a ruling defending the Texas Open Beaches Act and requiring removal of houses that moved into the public beach easement as a result of the storm. On January 25, 2013, the Texas Supreme Court remanded the issue to the Appellate Court to rule in light of the *Severance v. Patterson* decision. The case is currently before the Appellate Court for the First District and set for submission on Feb. 25th, meaning that it will be decided on the briefs alone and without oral argument. It will likely be sent back to the trial court for further findings. This case threatens to potentially expand the anti-public access precedent set by the *Severance* decision in Texas.

Collectively, these recent experiences in Texas demonstrate that even when a robust legal framework supporting retreat exists, it cannot be effective without diligent enforcement

In California, a de facto fortification process is already underway that risks making development along the coastline even more common and enduring in the face of eroding shorelines and coastal flooding. It is imperative that the Coastal Commission not rely on notice clauses alone and that it be prepared to enforce these clauses in the future to protect public access.

Local Coastal Plans and the issuance of Coastal Development Permits should be implemented in a manner that recognizes the dynamic nature of the coast and facilitates retreat.

The Draft Guidance correctly recognizes that "[t]he strongest approach for minimizing hazards is to avoid new development within areas vulnerable to flooding, inundation, and erosion."[7] Surfrider agrees with the Coastal Commission that changes in zoning and land use intensity along with the use of conservation easements and open space protections are important tools to direct future coastal development outside of high hazard areas. The use of easements is particularly important for protecting critical coastal habitats and public access to the coast. Therefore, Surfrider encourages the Commission to promote the adoption of strong policies favoring the promotion of public access and conservation easements.[8]

The use of easements can facilitate coastal adaptation in two key ways. First, in combination with setback requirements, the Commission could require easements that ensure there is a buffer of open land between the shoreline and any new coastal development, meaning that the development itself will have a longer lifetime while being consistent with the Coastal Act's goals of promoting public habitat and coastal conservation. Second, the Commission could encourage the adoption of rolling easements—public access or conservation easements that are defined relative to the location of the shoreline and move landward with the natural action of erosion, storm events, and sea level rise—to implement a conservation and public access strategy that recognizes the dynamic nature of the ocean coastline.

Rolling easements could be incorporated into local coastal plans as requirements for all new development along the coast. Rolling easements could then be incorporated as conditions in subsequently issued coastal development permits. In its broadest terms, the rolling easement would provide for the landward movement of the easement as sea level rises and erosion increases. If properly drawn, such an easement could be exacted within constitutional limitations articulated in *Nollan* and *Dolan*. *Nollan* and *Dolan* establish

[7] Draft Guidance at 24

[8] California Coastal Act, Chapter 3, Articles 2 and 3 offer strong protections for beach access and coastal recreation opportunities. *See, e.g.,* Cal. Pub. Res. Code § 30210 (providing that "In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."); *See also, e.g.,*Cal. Pub. Res. Code § 30220 (providing that "Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.").

that an exaction will be constitutional if it has a "significant nexus" to a legitimate public purpose and will be "roughly proportional" to the projected impacts of a proposed development.[9] The current draft guidance explicitly acknowledges that in the face of rising sea levels, any new development along the coast imperils both future public access and coastal habitat protection.[10] Therefore, anywhere that dedication of a lateral easement can be required to protect current public access or coastal habitats, the permitting authority should also be able to require that that the easement rolls landward as sea level rises in order to ensure that the impact of the development is offset for the lifetime of the structure. Under *Nollan and Dolan*, the significant nexus must articulate a connection between the impact of the proposed development and the exaction sought. A rolling easement requiring ultimate removal of a structure would be consistent with this requirement where the easement is exacted to protect public access and environmentally sensitive habitat areas. Over time as erosion causes the coastline to retreat, structures on an ocean-front property will come to lie right at the edge of the water, the existence of these structures can render public access to the coast impossible and/or hazardous to public safety. Furthermore, while coastal habitats can retreat as sea levels rise, their ability to do so is limited by the presence of man-made structures such as seawalls, roads, and structures on ocean front property. Thus, if these structures are not removed, they will make it impossible to protect important coastal habitats and public access.

Dolan establishes that even when there is a significant nexus, the exaction at issue must be "roughly proportional" to the projected impacts. In essence, the rough proportionality test is intended to keep the state from asking for too much when it may validly seek a dedication of property.[11] By their very nature, rolling easements should always be roughly proportional, as the "rolling" part of the rolling easement does not take effect until erosion actually occurs and the shoreline shifts landward.[12] Therefore, the reach of the rolling easement is dictated by the action of natural processes, and cannot reach landward until these processes occur, ensuring that the movement of the easement itself is "proportional" to the impacts of coastal development that prevents landward migration of coastal habitats and public accessways in the presence of sea level rise.[13]

While recognizing that the Bay Conservation and Development Commission ("BCDC") is a very different organization with a distinct mission, Surfrider encourages the Coastal Commission to look to its sister commission, BCDC, as an important example of how forward looking planning and permitting that accounts for sea level rise can be implemented. Surfrider encourages the Coastal Commission to consider an important example of sea level rise planning from within the state—the San Francisco Bay Plan Climate Change Amendment—as it considers how to incorporate sea level rise planning into local coastal plans and coastal development permits. The Climate Change Amendment to the Bay Plan aims to address the impacts of sea level rise on development

[9] Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
[10] Draft Guidance at 17.
[11] *See* Dolan v. City of Tagard, 512 U.S. 374 (1994).
[12] *See* Jim Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches without Hurting Property Owners*, 57 MD. L. REV. 1279, 1322-26 (1998).
[13] *See id.*

along the San Francisco Bay.[14] It contains a number of new findings and policies that are designed to facilitate adaptation to sea level rise, including:

- New findings that emphasize the importance of enhancing the adaptive capacity and resilience of the Bay's ecosystem.

- A finding that state agencies should not plan, develop, or build any new infrastructure that will require significant protection from sea level rise. (This policy was first advanced by the 2009 California Climate Adaptation Strategy.)

- A requirement to demonstrate that all proposed new developments are resilient to a mid-century projection of sea level rise.

The new Bay Plan climate change policies require that a qualified engineer conduct a sea level rise risk assessment for any new project along the Bay shoreline. If the assessment determines that an area will be vulnerable to sea level rise, the only developments that the BCDC will approve in that area are repairs to existing facilities, small projects that do not increase risks to public safety, infill developments and those new developments that can demonstrate they are designed to be "resilient to a midcentury sea level rise projection."[15] This requirement is significant because it means that sea level rise and the potential need for retreat are considered at the initial development stage not set aside to be dealt with in the future when the encroachment of rising seas becomes an imminent threat. Such planning reduces the risk that new structures will become essentially permanent in a manner that is inconsistent with public access and environmental protection.

Surfrider encourages the Coastal Commission to adopt similar policies for California's ocean coast. As set forth below, such an approach could require a showing that new construction is resilient to future sea level rise projections and designed in a manner to facilitate retreat. Similarly, the Local Coastal Plan updates encouraged by the Draft Guidance should employ similar principles and demonstrate that any zoning determinations incorporated in the LCP are also resilient to future projections of sea level rise.

Coastal Development Permits Should Require Engineering Plans for Retreat.

The Draft Guidance states that "[n]ew structures in hazard areas should include provisions to ensure structures are modified, relocated, or removed when they are threatened by natural hazards, including sea-level rise, in the future."[16] Surfrider supports the Draft Guidance's statement that Local Coastal Plans and permits "should require property owners to assume the risks of developing in a hazardous location . . . and should make it clear that property owners are responsible for modifying, relocating or removing new development if it is threatened in the future."[17]

[14] BCDC Res. No. 11-08
[15] *Id.*
[16] Draft Guidance at 24.
[17] *Id.*

We encourage the Coastal Commission to take a step further in its current Sea Level Rise Policy guidance and require retreat planning consistent with both the low and high sea level rise scenarios the current guidance recommends for evaluation as part of the CDP application[18]—at the time that a CDP is issued. Given that sea level rise is likely to increase erosion rates along much of California's coast, many new structures receiving CDPs will become threatened by erosion during the structure's lifetime. Therefore, to make the commitment that a new structure will not require a seawall meaningful, the Coastal Commission should require that all permit applicants submit engineering plans explaining how the proposed structure can be removed in the event that erosion threatens the structure in the future. Required plans should build upon the assessment of the amount of erosion over a property's lifetime recommended by the current Draft Guidance.[19] These plans should be drawn and signed by a professional engineer, explain how the structure will be removed (either in phases or all at once) when it becomes unsound due to erosion or impedes public access, and include specific triggers for when the retreat plan will be invoked. These retreat plans should be recorded into the deed as covenants alongside the applicant's waiver of his ability to seek a permit for a seawall in the future.

The Commission Should Convene an Expert Panel to Provide Specific Guidance on the Consideration of Takings Issues in Planning for Sea Level Rise.

The Draft Guidance shies away from one of the most complicated legal issues associated with promoting effective adaptation to sea level rise. Specifically, it states that "this guidance does not address how sea level rise may involve private property rights and takings issues in specific cases. Accelerating sea-level rise may raise difficult issues with respect to what kinds and intensities of development are allowable or that must be allowed, in specific areas threatened by sea-level rise in order to avoid a 'taking' of property within the meaning of the United States and California Constitutions."[20] According the Draft Guidance, meaningful guidance on takings is outside the scope of the Draft Guidance. However, any meaningful land use planning and future permitting activities that promote adaptation to sea level rise must confront the balance between private property rights, public access, and environmental protection in the face of rising seas.

The dynamic changes in the coastline that will be driven by sea level rise are thoroughly addressed by the Commission in the Draft Guidance. These changes will, in many cases, demand a strategy of retreat. For any such strategy to be successful, it must be carried out in a way that properly balances environmental protection, public access, and the rights of private property owners. To do this, local jurisdictions and the Coastal Commission itself must have clear guidance on the application of takings jurisprudence. Without such guidance, it has been Surfrider's experience that public access and coastal habitat protection are often sacrificed over a fear of future takings claims even if those

[18] Draft Guidance at 70-71.
[19] Draft Guidance at 82.
[20] Draft Guidance at 21.

fears are not well founded. As a result, Surfrider requests that the Coastal Commission convene an expert panel to evaluate the takings issues that are potentially implicated by planning and permitting that accounts for sea level rise. This panel should work to develop recommendations and guidance for the Coastal Commission on how takings issues can be proactively and effectively addressed so that the Commission is able to exercise its authority within constitutional parameters.

* * *

Surfrider sincerely thanks the Coastal Commission for taking the time to review these comments on the Draft Sea Level Rise Policy Guidance. Surfrider strongly supports the Coastal Commission's efforts to encourage proactive planning to prepare for and respond to sea level rise. However, there are a number of additional measures that are required to ensure that measures that enable the Commission and local governments to respond to sea level rise will be effective and satisfy the Coastal Act's requirements to protect public access and environmentally sensitive habitat areas. Specifically, the Coastal Commission must take the following steps to increase the likelihood of successful sea level rise adaptation:

1. Provide guidance on the lifetime of existing structures and require reevaluation of coastal protection structures on timeframes that promote meaningful adaptation to sea level rise.

2. Pursue a robust program of enforcement that prioritizes the protection of public access and environmentally sensitive habitat areas as sea levels rise and retreat is required.

3. Encourage incorporation of adaptation measures into local coastal plans and coastal development permits ; focus on measures that recognize the dynamic nature of the ocean coast, including rolling easements and restrictions on development that is not resilient to sea level rise.

4. Require that coastal development permits contain engineering plans to implement retreat, including specific triggers for retreat actions and specific measures that will be taken to remove or relocate structures, in order to secure property owner commitments that new development will not require seawalls.

5. Convene an expert panel to develop recommendations and guidance for the Coastal Commission on how takings issues can be proactively and effectively addressed so that the Commission is able to exercise its authority within constitutional parameters.

Surfrider looks forward to working with the Coastal Commission on this continued effort.

Sincerely,

On Behalf of Surfrider Foundation Legal Department
Angela T. Howe, Esq.
Legal Director
Surfrider Foundation